

IN THE UNITED STATE DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

CLARKSBURG DIVISION

KIM S. MILLER, individually and as)
Personal Representative of the)
of the Estate of NICOLE FARIS)
MILLER,)
Plaintiff,)
vs.)CASE NO. 1:11-cv-00151-IMK
WALTHER PRODUCTIONS, INC., d/b/a)
ALL GOOD FESTIVAL, a Maryland)
corporation; ALL GOOD FESTIVAL,)
INC., a Maryland corporation;)
TIM WALTHER; JUNIPA CONTENTO;)
MARVIN HUGGINS; MARVIN'S)
MOUNTAINTOP, LLC, a West Virginia)
limited liability company;)
M & M PARKING, INC.,)
a/k/a M & M PARKING SERVICES, INC.,)
a/k/a M & M EVENT SERVICES, LLC, a)
Pennsylvania corporation; EVENT)
STAFFING, INC., a Virginia)
corporation; NATIONAL EVENT)
SERVICES, INC., a New Hampshire)
corporation; AXIS SECURITY, INC.,)
a Tennessee corporation;)
CLAY HARLIN LEWIN; JAMES TOBIN;)
and JIM TOBIN PRODUCTIONS,)
Defendants.)

and

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Plaintiff,)
vs.)CASE NO. 1:11-cv-00152-IMK
WALTHER PRODUCTIONS, INC., d/b/a)
ALL GOOD FESTIVAL, a Maryland)
corporation; ALL GOOD FESTIVAL,)

INC., a Maryland corporation;)
TIM WALTHER; JUNIPA CONTENTO;)
MARVIN HUGGINS; MARVIN'S)
MOUNTAINTOP, LLC, a West Virginia)
limited liability company;)
M & M PARKING, INC.,)
a/k/a M & M PARKING SERVICES, INC.,)
a/k/a M & M EVENT SERVICES, LLC, a)
Pennsylvania corporation; EVENT)
STAFFING, INC., a Virginia)
corporation; NATIONAL EVENT)
SERVICES, INC., a New Hampshire)
corporation; AXIS SECURITY, INC.,)
a Tennessee corporation;)
CLAY HARLIN LEWIN; JAMES TOBIN;)
and JIM TOBIN PRODUCTIONS,)
))
Defendants.)

and

ELIZABETH ROSE DORAN,)
))
Plaintiff,)

vs.) CASE NO. 1:11-cv-00160-IMK

WALTHER PRODUCTIONS, INC., d/b/a)
ALL GOOD FESTIVAL, a Maryland)
corporation; ALL GOOD FESTIVAL,)
INC., a Maryland corporation;)
TIM WALTHER; JUNIPA CONTENTO;)
MARVIN HUGGINS; MARVIN'S)
MOUNTAINTOP, LLC, a West Virginia)
limited liability company;)
M & M PARKING, INC.,)
a/k/a M & M PARKING SERVICES, INC.,)
a/k/a M & M EVENT SERVICES, LLC, a)
Pennsylvania corporation; EVENT)
STAFFING, INC., a Virginia)
corporation; NATIONAL EVENT)
SERVICES, INC., a New Hampshire)
corporation; AXIS SECURITY, INC.,)
a Tennessee corporation;)
CLAY HARLIN LEWIN; JAMES TOBIN;)
and JIM TOBIN PRODUCTIONS,)
))
Defendants.)

**MOTION FOR APPROVAL OF COMPROMISE OF BODILY INJURY
AND WRONGFUL DEATH CLAIM AND APPORTIONMENT AND
DISTRIBUTION OF WRONGFUL DEATH SETTLEMENT PROCEEDS**

Now comes Plaintiff, Kim S. Miller, individually and as Personal Representative of the Estate of Nicole Faris Miller, by counsel, Carl E. Pierce II, Joseph C. Wilson IV, William P. Early and J. Michael Benninger, and moves the Court, pursuant to the provisions of *West Virginia Code* §§ 55-7-5, 6 and 7, for approval of the compromise and settlement of this bodily injury and wrongful death case and for approval of the apportionment and distribution of the net wrongful death settlement proceeds as proposed herein. This Motion is based upon the following factual information:

1. Plaintiff Kim S. Miller is an adult person who is a citizen and resident of the State of South Carolina, and he is expected to testify, under oath, in support of this Motion, at the hearing to be held herein.

2. On July 17, 2011, Nicole Faris Miller died as the result of injuries sustained when Defendant Clay Harlin Lewin's motor vehicle crushed her, in Preston County, West Virginia, as described in the Amended Complaint filed in this civil action.

3. At the time of her death, Nicole Faris Miller was 20 years old, and her birth date is November 1, 1990. She was unmarried and had no children.

4. Nicole Faris Miller died intestate.

5. In this civil action, Plaintiff Kim S. Miller has presented a liability claim, under West Virginia law, against Defendant Lewin, among others, for the bodily injury and wrongful death of Nicole Faris Miller.

6. Plaintiff Kim S. Miller, father of Nicole Faris Miller, was duly appointed as Personal Representative of the Estate of Nicole Faris Miller in Charleston County, State of South Carolina, where Nicole was then a citizen and resided.

7. At the time of her death, Nicole Faris Miller was survived by her father Kim S. Miller; her brother Kristopher Miller; and her estranged mother Michelle Miller, who are potential statutory distributees under the provisions of *West Virginia Code* § 55-7-6(b), which such persons will be given notice of this case and the hearing to be held on this Motion.

8. None of the potential statutory distributees are known to be minors, incompetent persons or in the military services of the United States of America or under any legal disability.

9. As a result of settlement negotiations prior to, during and subsequent to the mediation conducted in Pittsburgh, Pennsylvania, on June 4, 2012, Plaintiff Kim S. Miller and his counsel were successful in reaching a compromise settlement with Defendant Clay Harlin Lewin and his insurance carrier for all

liability claims against said Defendant for the bodily injury and wrongful death of Nicole Faris Miller.

10. Taking into account all relevant factors under *West Virginia Code* § 55-7-6 and the agreement among the potential statutory beneficiaries, it is proposed that all net settlement proceeds, after payment of attorney fees and case expenses, be distributed and paid as follows:

75% to Kim S. Miller (father)

25% to Kristopher Miller (brother)

11. The undersigned will give notice in writing by Certified Mail, Return Receipt Requested, along with a copy of this Motion, to each of the potential statutory beneficiaries of the proposed compromise and settlement of this wrongful death case and will provide a copy of a Notice of Hearing upon the scheduling of same by the Court.

12. Prior to the hearing scheduled by the Court, Plaintiff and his counsel will provide all necessary documentation and information to the Court and the parties so that a full and complete review and analysis of this Motion can be completed. Such information will include the Defendant's liability policy limit and the portion of same to be paid to Plaintiff Miller; the terms and conditions of counsel's retention; the amount of the attorney fee claimed; the amount of case expenses incurred to date; the special damages incurred,

including funeral and burial expenses and the payment of same; the amount of any outstanding medical, hospital and other expenses; the amount of any subrogation or reimbursement liens for any amounts paid on behalf of Ms. Miller resulting from her bodily injuries and wrongful death; the consent and waiver forms signed by potential statutory distributees; and any and all additional information deemed necessary by the Court.

13. The only issue known to exist at this time which may confound the settlement with this Defendant is the fact that certain Defendants continue to assert that their cross-claims against Defendant Lewin will remain. This position is contrary to the holding in *Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990).

14. Plaintiff Kim S. Miller desires to compromise and settle all claims presented against Defendant Clay Harlin Lewin in this wrongful death civil action and further requests permission:

(a) To execute the necessary and acceptable release and settlement agreement with Defendant Clay Harlin Lewin and his insurance company;

(b) To pay attorney fees and case expenses pursuant to the terms of the written contingency fee agreement with counsel; and,

(c) To make distribution of the net settlement proceeds as ordered by the Court.

WHEREFORE, Plaintiff Kim S. Miller, individually, and as Personal Representative of the Estate of Nicole Faris Miller, requests that this Motion be reviewed by the Court, that a hearing be scheduled at a time and place when testimony can be presented in support of the Motion, and that an Order be entered approving the compromise and settlement of this wrongful death case with Defendant Clay Harlin Lewin and approving the proposed distribution of the net settlement proceeds as requested herein, together with such other and further relief as the Court deems appropriate and as requested herein.

KIM S. MILLER, individually and as
Personal Representative of the Estate
of NICOLE FARIS MILLER,
PLAINTIFF, BY COUNSEL.

s/J. Michael Benninger
J. Michael Benninger (W.Va. State Bar # 312)
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to: John P. Fuller, Esquire; Robert P. Martin, Esquire; Melissa M. Barr, Esquire; Melvin F. O'Brien, Esquire; Steven M. Houghton, Esquire; Boyd L. Warner, Esquire; Brandy D. Bell, Esquire; Kristina Cecil, Esquire; Daniel F. Fitch, Esquire; Keith C. Gamble, Esquire; Kenneth L. Hopper, Esquire; Jonathan J. Jacks, Esquire; Douglas A. Spencer, Esquire; C. Michael Bee, Esquire; John L. MacCorkle, Esquire; Mark C. Tanenbaum, Esquire; Jeffrey S. Zurbuch, Esquire; and Peter G. Zurbuch, Esquire.

/s/
J. Michael Benninger, Esquire